No. 99-39

In the Supreme Court of the United States

FRANK QUINTERO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in applying the collateral estoppel principle of double jeopardy analysis, a court seeking to identify the basis for the jury's acquittal on one count may draw inferences from the jury's inability to agree on a verdict on another count containing the same element.

2. Whether, consistent with the Constitution and res judicata principles, when a jury is unable to reach a verdict on particular counts, the government may obtain a superseding indictment that adds new counts that arise out of the same criminal conduct.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 165 F.3d 831. The opinion of the district court (Pet. App. C1-C16) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1999. A petition for rehearing was denied on April 2, 1999 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on July 1, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury sitting in the Southern District of Florida returned a third superseding indictment charging petitioner with conspiracy to import cocaine, in

violation of 21 U.S.C. 963; conspiracy to engage in money laundering, in violation of 18 U.S.C. 1956(h); eight counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i); six counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i); and one count of money laundering, in violation of 18 U.S.C. 1957. Petitioner moved to dismiss the indictment on the ground, *inter alia*, that the collateral estoppel aspect of the Fifth Amendment's Double Jeopardy Clause barred the prosecution. The district court granted the motion in part and denied it in part. Pet. App. C1-C15. On cross-appeals by petitioner and the government, the court of appeals affirmed in part, vacated in part, and remanded for further proceedings. *Id.* at A1-A13.

1. In December 1995, the grand jury returned a second superseding indictment charging petitioner and 13 co-defendants with conspiracy to import and distribute cocaine and to launder the proceeds through a series of financial transactions. The indictment alleged that petitioner, a criminal defense attorney, assisted the drug traffickers by forming front corporations, opening Swiss bank accounts for transfers of money to and from the United States, and traveling to Switzerland to make deposits into those accounts. Pet. App. A2-A3; *id.* at C2.

Count 2 charged petitioner with conspiracy to import cocaine, in violation of 21 U.S.C. 963, and Count 3 charged him with conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. Count 18 charged him with conspiracy to violate three substantive provisions of the money-laundering statutes: Count 18(a) alleged that he conspired to violate 18 U.S.C. 1956(a)(1), Count 18(b) alleged that he conspired to violate 18 U.S.C. 1956(a)(2), and Count 18(c) alleged that he conspired to violate 18 U.S.C. 1957. He was also

charged with seven substantive counts of money laundering (Counts 19, 21, 22, 23, 24, 25, and 26), in violation of 18 U.S.C. 1956(a)(1). Pet. App. A3.

Petitioner stood trial alone. The jury acquitted him on Counts 3, 18(a), and 21 through 26. After the jury failed to reach a verdict on Counts 2, 18(b), 18(c), and 19, the district court declared a mistrial as to those counts. Pet. App. A3.

Petitioner moved for a judgment of acquittal on each of the mistried counts. The district court granted the motion with respect to Count 2, ruling that the government had failed to prove that petitioner knowingly participated in the conspiracy to import cocaine. The court denied the motion with respect to the money-laundering conspiracies charged in Counts 18(b) and 18(c) and the substantive money-laundering offense charged in Count 19. Pet. App. A3-A4; *id.* at C2.

2. In May 1997, the grand jury returned a third superseding indictment against petitioner. Pet. App. A4; *id.* at C3.

Count 2 of the third superseding indictment charged petitioner with conspiracy to import cocaine, in violation of 21 U.S.C. 963. Count 18, which charged petitioner under 18 U.S.C. 1956(h) with conspiracy to engage in money laundering, was divided into three parts. Count 18(a) alleged that petitioner conspired to violate 18 U.S.C. 1956(a)(2)(A), which prohibits transporting funds out of the United States with the intent to promote an unlawful activity. Count 18(b) alleged that petitioner conspired to violate 18 U.S.C. 1956(a)(2)(B)(i), which prohibits transporting funds out of the United States, knowing that the funds are the proceeds of unlawful activity and that the transportation is designed to conceal the nature, location, source, ownership, or control of the funds. Count 18(c) alleged that

petitioner conspired to violate 18 U.S.C. 1957, which prohibits "knowingly engag[ing] * * * in a monetary transaction in criminally derived property of a value greater than $10,000." Petitioner was also charged with 15 substantive counts of money laundering: eight counts under 18 U.S.C. 1956(a)(1)(B)(i) (Counts 19, 23, 25, 27, 30, 31, 33, and 34), six counts under 18 U.S.C. 1956(a)(1)(A)(i) (Counts 20, 24, 26, 29, 32, and 35), and one count under 18 U.S.C. 1957 (Count 28). Pet. App. A4 & n.5; Third Superseding Indictment 2-5, 16-19, 21-32.

Petitioner moved to dismiss the indictment on, *inter alia*, double jeopardy grounds. The district court held that the collateral estoppel rule of double jeopardy analysis did not bar prosecution of the money-laundering conspiracies charged in Counts 18(b) and 18(c) and the substantive money-laundering offense charged in Count 19. Pet. App. C3-C4. Noting that those counts were "based on the identical conduct that formed the basis of the three charges that resulted in a hung jury" at the first trial, the court concluded that "[n]either the Double Jeopardy Clause nor the collateral estoppel doctrine prevents the Government from retrying a defendant on mistried charges." *Id.* at C4.[1]

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[1] Count 18(b) of the second superseding indictment, which charged a conspiracy to commit money laundering in violation of 18 U.S.C. 1956(a)(2), was divided in the third superseding indictment into Count 18(a), which charged a conspiracy to violate Section 1956(a)(2)(A), and Count 18(b), which charged a conspiracy to violate Section 1956(a)(2)(B)(i). Count 18(c) charged a conspiracy to violate 18 U.S.C. 1957 in both the second and third superseding indictments. Count 19 charged the same substantive money laundering offense under 18 U.S.C. 1956(a)(1) in both the second and third superseding indictments. Pet. App. A4 & n.5.

The district court held that collateral estoppel did, however, bar prosecution of the money-laundering conspiracy charged in Count 18(a) and the substantive money-laundering offenses charged in Counts 23 through 27 and Counts 29 through 35. Pet. App. C4-C7. The court reasoned that the jury's verdicts of acquittal at the first trial—on one of the three money-laundering conspiracy charges and six of the seven substantive money-laundering charges—must have been based on the jury's finding that petitioner lacked the requisite criminal intent. *Id.* at C6. The court concluded that, because "the acquittals in the first trial established for all time [petitioner's] lack of intent to break the law while committing the acts in question," the government was precluded from establishing the essential intent elements of Counts 18(a), 23 through 27, and 29 through 35. *Id.* at C6-C7.[2]

Petitioner appealed the denial of his motion to dismiss Counts 18(b), 18(c), and 19, and the government cross-appealed the dismissals of Counts 18(a), 25, 27, 30, 31, 33, and 34. Pet. App. A4-A5.

4. The court of appeals affirmed in part, vacated in part, and remanded for further proceedings. Pet. App. A1-A13.

First, the court of appeals held, although for different reasons than those stated by the district court, that the

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[2] The court dismissed Counts 2, 20, and 28 on other grounds. The court concluded that Count 2 violated the Double Jeopardy Clause because it was identical to the previous Count 2 on which the court had granted a judgment of acquittal. Pet. App. C3 & n.2. The court concluded that Counts 19 and 20 charged the same offense twice and dismissed Count 20 as multiplicitous. *Id.* at C7-C9. The court dismissed Count 28 for failure to state an offense under 18 U.S.C. 1957. Pet. App. C9-C10. The government did not challenge those rulings on appeal.

Double Jeopardy Clause does not bar prosecution of the money-laundering conspiracies charged in Counts 18(b) and 18(c), and the substantive money-laundering offense charged in Count 19. Pet. App. A6-A10. The court did not conclude that the government may always retry a mistried count, notwithstanding the jury's acquittals on other counts. But the court found that the government could retry the three counts on which the jury failed to reach a verdict in this case, because the jury (and the district court in granting the judgment of acquittal on the deadlocked drug conspiracy count) did not necessarily find an essential element of any of those counts against the government. *Id.* at A8-A9.

The court of appeals rejected as "clearly erroneous" the district court's determination that the jury acquitted petitioner on certain of the money-laundering counts because the jury found that "he did not have the requisite criminal intent." Pet. App. A9. "If a lack of intent had been the reason for [petitioner's] acquittals," the court explained, "the jury should also have acquitted him of the substantive money laundering charge (Count 19)," but, instead, the jury failed to reach a verdict on that count. *Ibid.* The court concluded, based on the district court's jury instructions and the jury's failure to reach a verdict on Count 19, that the jury must have had a different reason for acquitting petitioner of conspiracy to engage in money laundering in violation of 18 U.S.C. 1958(a)(1)—namely, "the government's failure to prove that [petitioner] knowingly entered into an agreement to violate § 1956(a)(1) as charged in the second superseding indictment." *Ibid.* Accordingly, because an agreement to violate Section 1956(a)(1) is not an essential element or an "ultimate fact" of the offenses charged in Counts 18(b), 18(c), and 19 of the third superseding indictment,

the court held that the government is not precluded from prosecuting those counts. *Id.* at A10.

Second, the court of appeals held, for similar reasons, that the government is not precluded from prosecuting the seven counts charged for the first time in the third superseding indictment, *i.e.*, the money-laundering conspiracy charged in Count 18(a) and the substantive money-laundering offenses charged in Counts 25, 27, 30, 31, 33, and 34. Pet. App. A10-A13. The court noted that the substantive money-laundering offenses in the third superseding indictment involve different acts (*e.g.*, different financial transactions) than did the substantive money-laundering offenses in the second superseding indictment. "Thus," the court explained, "there was no issue or fact in these added counts which was necessarily decided in [petitioner's] favor in the first trial." *Id.* at A12. The court also concluded that the jury's determination that petitioner did not agree to participate in the conspiracy to violate 18 U.S.C. 1956(a)(1) does not bar his prosecution on the newly added counts, because such an agreement "is not an ultimate fact or element of a conspiracy to violate § 1956(a)(2)(A)," the conspiracy charged in Count 18(a), or of the substantive Section 1956(a)(1) offenses charged in the six remaining counts. Pet. App. A13.

ARGUMENT

1. Petitioner contends (Pet. 6-13) that the doctrine of collateral estoppel bars his prosecution for the money-laundering conspiracies charged in Count 18 and the substantive money-laundering offenses charged in Counts 19, 25, 27, 30, 31, 33, and 34 of the third superseding indictment. He further argues that the circuits are in conflict over whether a court may consider a jury's failure to reach a verdict on one count in deter-

mining the basis for the jury's acquittal on a related count. Those claims lack merit, and this Court's review is not warranted.

a. The Double Jeopardy Clause of the Fifth Amendment incorporates the doctrine of collateral estoppel, or issue preclusion, which bars a prosecution that would require the relitigation of ultimate factual issues that were resolved against the government in an earlier prosecution. *Ashe* v. *Swenson*, 397 U.S. 436, 445 (1970). A jury's acquittal of a defendant on one charge precludes the government from proceeding against him on a second charge, however, only if the jury necessarily found a fact in the defendant's favor that is an essential element of the second charge (*i.e.*, a fact that the government must prove beyond a reasonable doubt). See *Ashe*, 397 U.S. at 443-445; *Dowling* v. *United States*, 493 U.S. 342, 347-348, 350-352 (1990). The defendant bears the burden of identifying the factual issue necessarily decided at the first trial that precludes a second trial. *Dowling*, 493 U.S. at 350-351.

Here, the court of appeals correctly concluded that the jury at petitioner's trial on the second superseding indictment did not necessarily find any fact in petitioner's favor that is an essential element of the offenses charged in Counts 18, 19, 25, 27, 30, 31, 33, and 34 of the third superseding indictment. The court, recognizing that the jury had acquitted petitioner on some counts but had failed to reach verdicts on other counts, sought to ascertain the basis for the verdicts of acquittal. Pet. App. A6, A8-A9, A11. The court determined that "the only logical conclusion which reconciles the jury's acquittal on Count 18(a) [conspiracy to engage in money laundering, in violation of 18 U.S.C. 1956(a)(1)] with the jury's failure to reach a verdict on Count 19 [substantive money laundering, in

violation of 18 U.S.C. 1956(a)(1)]" was that "the jury must have based its acquittal on the § 1956(a)(1) conspiracy charge (Count 18(a)) on the government's failure to prove that [petitioner] knowingly entered into an agreement to violate § 1956(a)(1)." Pet. App. A9. Accordingly, because an agreement to violate Section 1956(a)(1) is not an essential element of the offenses charged in Counts 18, 19, 25, 27, 30, 31, 33, and 34 of the third superseding indictment, the doctrine of issue preclusion does not bar the prosecution of those counts.

There is no merit to petitioner's claim (Pet. 6-7) that the court of appeals erred by taking into account the jury's failure to reach verdicts on certain counts, as well as the jury's acquittals on other counts, in ascertaining what facts the jury necessarily found in petitioner's favor. As this Court has explained, to determine whether a defendant's prosecution is barred by collateral estoppel, a court must "examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444. The court's "inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Ibid.* (internal quotation marks omitted). A jury's failure to reach a verdict on certain counts, while acquitting the defendant on other counts, is among the "relevant matter" that a court may consider in determining what facts the jury necessarily found in the defendant's favor. Otherwise, the courts in many cases, such as this one, would be required to assume that the jury acted irrationally in reaching a mixed verdict, contrary to this Court's recognition that collateral estoppel is "predicated on the

assumption that the jury acted rationally." *United States* v. *Powell*, 469 U.S. 56, 68 (1984).[3]

The Eleventh Circuit's approach to the issue preclusion question in this case is similar to the approach taken by the First and D.C. Circuits. See *United States* v. *Aguilar-Aranceta*, 957 F.2d 18, 24-25 (1st Cir.), cert.

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[3] In our view, that analysis indicates that collateral estoppel should never bar the government from retrying a defendant on a count on which a jury was unable to reach a verdict when the same jury acquitted him on another count. There are only two possible explanations for such a mixed verdict. First, the jury may have found that the government failed to prove a fact that, while essential for conviction on the count on which the defendant was acquitted, was not essential for conviction on the count on which the jury was deadlocked. As explained above, if the jury did not find an essential fact in the defendant's favor on the acquitted count that would have to be proved in retrying the defendant on the "hung" count, collateral estoppel does not bar retrial on the latter count. See *Dowling*, 493 U.S. at 347-348. Second, the jury may have found that the government failed to prove a fact that was essential for conviction on both counts. In that case, the jury's failure to acquit on one count would be inconsistent with the jury's acquittal on the other count. As this Court has recognized, "principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful" when the jury's verdict is inconsistent. *Powell*, 469 U.S. at 68; see *Standefer* v. *United States*, 447 U.S. 10, 23 n.17 (1980) (inconsistency in jury verdicts "is reason, in itself, for not giving preclusive effect to the acquittals"). Accordingly, under either explanation for the jury's verdict of acquittal on one count, the government would not be precluded from retrying the defendant on another count on which the jury was deadlocked. To date, the courts of appeals have not agreed with that analysis. See, *e.g.*, *United States* v. *Bailin*, 977 F.2d 270, 275-280, 282-283 (7th Cir. 1992); *United States* v. *Frazier*, 880 F.2d 878, 882-883 (6th Cir. 1989), cert. denied, 493 U.S. 1083 (1990). Acceptance of that analysis, however, is not essential to the judgment in this case.

denied, 506 U.S. 834 (1992); *United States* v. *White*, 936 F.2d 1326, 1328-1329 (D.C. Cir.), cert. denied, 502 U.S. 942 (1991). In those cases, the defendant was charged with multiple counts that involved a common issue, such as the defendant's knowledge or intent. The jury acquitted the defendant on one count and deadlocked on another count. The courts of appeals, taking into account both the jury's verdict of acquittal on one count and the jury's failure to reach a verdict on the other count, declined to hold that the verdict of acquittal rested on a finding in the defendant's favor on the common issue. The courts instead reasoned that the verdict of acquittal could more rationally be explained as resting on the jury's finding on an issue that was not common to both counts. *Aguilar-Aranceta*, 957 F.2d at 24-25; *White*, 936 F.2d at 1329; accord *United States* v. *Deerman*, 837 F.2d 684, 690-691 (5th Cir.) (in considering whether the government was precluded from prosecuting the defendants on drug importation charges, the court considered both the jury's verdicts of acquittal on drug possession charges and the jury's failure to reach verdicts on drug importation charges), cert. denied, 488 U.S. 856 (1988).

b. Petitioner contends (Pet. 7-11) that the decision below conflicts with the decisions of four other circuits. While there is some tension between the approach of the court of appeals in this case, which sought to reconcile the jury's acquittals on some counts with its failure to reach verdicts on other counts, and the reasoning applied in some other circuits, which have declined to consider whether a determination that a jury's acquittal on one count rested on a particular ground would be consistent with the jury's failure to reach a verdict on a related count, there is not at this time a

square conflict in the circuits on the proper collateral estoppel analysis in such cases.

The earliest case cited by petitioner, *United States* v. *Mespoulede*, 597 F.2d 329 (2d Cir. 1979), is not on point. In that case, the jury acquitted the defendant on a drug possession charge, but failed to reach a verdict on a drug conspiracy charge. The government retried the defendant on the conspiracy charge, presenting evidence of his drug possession as proof of the conspiracy, and the jury found the defendant guilty of that charge. The court of appeals reversed the conviction, holding that the government was precluded from seeking to prove the conspiracy charge with evidence that the defendant possessed the drug, because the jury's acquittal on the drug possession charge at the first trial necessarily determined that he did not. *Id.* at 332-336. Contrary to petitioner's assertion (Pet. 7), *Mespoulede* did not "rule[] that the government was estopped from retrying the defendant on the conspiracy count." It determined instead what evidence was admissible at an undisputably permissible retrial. Cf. *United States* v. *Felix*, 503 U.S. 378, 389 (1992) (double jeopardy does not bar prosecution of a conspiracy charge after previous prosecution for related substantive offenses). In any event, *Mespoulede* has been effectively overruled by this Court's decision in *Dowling*, which held that collateral estoppel does not bar the admission of evidence of a fact resolved in a defendant's favor at the first trial, provided that the government is not seeking to prove that fact beyond a reasonable doubt at the second trial. Compare *Dowling*, 493 U.S. at 347-350, with *Mespoulede*, 597 F.2d at 334-335; see also *United States* v. *Bailin*, 977 F.2d 270, 277 n.9 (7th Cir. 1992) (noting that "*Mespoulede*, insofar as it held that issue

preclusion applies to evidentiary as well as ultimate facts, has been partially overruled by *Dowling*").[4]

In *Bailin*, the jury was unable to reach a verdict on the counts charging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), but it acquitted the defendant on some of the other counts, which charged offenses that were also among the predicate racketeering acts alleged in the RICO counts. See 18 U.S.C. 1961(1) and (5) (defining "racketeering activity" and "pattern of racketeering activity" under RICO). The Seventh Circuit held that, although the government could retry the defendant on the RICO counts (and other counts on which the jury had deadlocked), the government could not base the RICO counts on predicate acts of which the defendant was acquitted. 977 F.2d at 275-283. In so holding, the Seventh Circuit, consistent with the Eleventh Circuit here, recognized that the government is not precluded from retrying a defendant on a count on which the jury failed to reach a verdict, unless the defendant has met the "extremely difficult" burden of establishing that, in

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[4] Petitioner also asserts (Pet. 10) that the decision below conflicts with *United States* v. *Corley*, 824 F.2d 931 (11th Cir. 1987). An intracircuit conflict does not, however, warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Nor does any such conflict exist. Like *Mespoulede*, *Corley* involved the exclusion of evidence, which related to a count on which the defendant had been acquitted, at a retrial on another count on which the jury had failed to reach a verdict. And like *Mespoulede*, *Corley* has been effectively overruled by *Dowling*. See also *United States* v. *Shenberg*, 89 F.3d 1461, 1480 n.23 (11th Cir. 1996) (circuit precedent "hold[ing] that the doctrine of collateral estoppel bars the government from introducing the underlying evidence of acquitted substantive counts in the retrial of the mistried conspiracy" "no longer constitutes good law" after *Dowling*), cert. denied, 519 U.S. 1117 (1997).

rendering an acquittal on a different count, the jury "necessarily determined" an essential element of the count to be retried. *Id.* at 282. The government did not dispute that the jury, in acquitting the defendant on certain counts that doubled as RICO predicate acts, necessarily decided that the defendant did not commit those acts. While the court rejected the government's argument that collateral estoppel never applies to a retrial of counts on which the jury failed to reach a verdict, and expressed the view that the jury's failure to agree on a verdict is "too inconclusive" to support an argument that hung counts are necessarily "inconsistent" with acquitted counts, see *id.* at 275-280, 282-283; note 3, *supra*, the court was not required in *Bailin*, as in this case, to ascertain the ground on which the jury acquitted the defendant on certain counts of an indictment. No conflict thus exists between this case and *Bailin*.

In *United States* v. *Frazier*, 880 F.2d 878 (6th Cir. 1989), cert. denied, 493 U.S. 1083 (1990), the court held, among other things, that the defendants could not be retried on a charge of making false entries with respect to one loan, on which the jury had deadlocked, because the jury had acquitted the defendants on a charge of misapplication of bank funds with respect to the same loan. The court reasoned that the only disputed evidence on the misapplication count related to the issue of intent to defraud, and that a jury could not find that the defendants lacked the requisite intent on the misapplication count without also finding that they lacked the requisite intent on the related false entries count. *Id.* at 886. No similar circumstances, in which the jury's verdict of acquittal on one count could be explained *only* on a ground inconsistent with the jury's failure to reach a verdict on another count, exist in this case.

Finally, in *United States* v. *Romeo*, 114 F.3d 141 (9th Cir. 1997), the court of appeals held that the defendant's acquittal on a drug possession count barred his retrial on a drug importation count on which the jury failed to reach a verdict. The court concluded that "a rational jury could [not] have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration," *i.e.*, that the defendant did not know that marijuana was in the trunk of the car that he drove from Mexico to the United States. *Id.* at 143. The court rejected the dissent's argument that the verdict of acquittal must have rested on another ground—that the defendant lacked intent to distribute marijuana—because the jury should have acquitted on both counts if it found that the defendant lacked knowledge of the marijuana. The court reasoned that its interpretation of the jury's verdict of acquittal "attributes much less irrationality to the jury than does the dissent's reading," because a "necessary corollary" of the dissent's interpretation was that, "although [the defendant] knowingly possessed the marijuana, he possessed the 188 pounds of marijuana *without* the intent to distribute it." *Id.* at 144.

This case is distinguishable from *Romeo*. The Eleventh Circuit's reading of the jury's verdict of acquittal as resting on the absence of an agreement to engage in money laundering does not imply that the jury irrationally rejected inferences from the evidence. It is true that the Ninth Circuit's statement in *Romeo* that "[t]he inquiry under *Ashe* is what the jury actually decided when it reached its verdict, not on why the jury could not agree on the deadlocked count," 114 F.3d at 144, is in tension with the Eleventh Circuit's approach here in assessing the basis for the jury's verdict of acquittal. But neither *Romeo* nor any other case cited

by petitioner holds that a jury's failure to reach a verdict on one count is always irrelevant in determining what facts the jury necessarily found in acquitting the defendant on another count. Accordingly, because no square conflict has yet arisen among the circuits with respect to the application of collateral estoppel in cases involving mixed verdicts, this Court's review is not warranted.

2. Petitioner also contends (Pet. 14-24) that the new counts included in the third superseding indictment (Counts 25, 27, 30, 31, 33, and 34) are barred by the Double Jeopardy Clause, the Due Process Clause, and res judicata. The Eleventh Circuit did not address those contentions, as petitioner concedes (Pet. 6). This Court ordinarily does not consider arguments not expressly ruled upon by the courts below. See, *e.g.*, *National Collegiate Athletic Ass'n* v. *Smith*, 119 S. Ct. 924, 930 (1999) (citing additional cases). In any event, petitioner's contentions lack merit.

Petitioner's double jeopardy claim is foreclosed by *United States* v. *Dixon*, 509 U.S. 688, 703-704 (1993). The Court held in *Dixon* that the sole test for determining whether two offenses are separate for double jeopardy purposes is that set forth in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), *i.e.*, "whether each offense contains an element not contained in the other." *Dixon*, 509 U.S. at 696. Because petitioner does not, and cannot, contend that any of the new counts are not separate offenses under the *Blockburger* test, his double jeopardy claim necessarily fails.

Relying on *Brown* v. *Ohio*, 432 U.S. 161 (1977), petitioner nonetheless argues (Pet. 16-17) that the Double Jeopardy Clause and the Due Process Clause bar a successive prosecution when the government could have brought all the charges in a single prosecution by

exercising "due diligence." That argument rests on a misreading of *Brown*. Applying the *Blockburger* test, the Court held in *Brown* that the Double Jeopardy Clause "forbids successive prosecution and cumulative punishment for a greater and lesser included offense." 432 U.S. at 169. The Court then noted that "[a]n exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence." *Id.* at 169 n.7. Petitioner's argument would turn that exception on its head by imposing a "due diligence" requirement on the government's ability to bring a second prosecution otherwise permitted by *Blockburger*. That rule would simply reformulate the "same conduct" test of *Grady* v. *Corbin*, 495 U.S. 508 (1990), which was explicitly overruled in *Dixon*. See *Dixon*, 509 U.S. at 705 (recognizing that the Double Jeopardy Clause leaves the government "entirely free to bring [its prosecutions] separately").

Petitioner claims support for his reading of *Brown* in *Rashad* v. *Burt*, 108 F.3d 677 (6th Cir. 1997), cert. denied, 522 U.S. 1075 (1998), a decision that is inconsistent with this Court's precedents, that has been severely limited by the Sixth Circuit itself, and that is distinguishable from the present case. In *Rashad*, the defendant was successively prosecuted for possession with intent to deliver two quantities of cocaine that were seized at the same time from his house and his car. In holding that the second prosecution, which involved the cocaine found in the car, was barred by the Double Jeopardy Clause, the Sixth Circuit purported to state "[t]he proper standard for determining * * * if the two prosecutions violate double jeopardy": "whether the actual evidence needed to convict the defendant in

the first trial is the same as the evidence needed to obtain the second conviction * * * irrespective of whether the convictions are under statutes that satisfy *Blockburger*'s 'same elements' test." 108 F.3d at 680. The court did not acknowledge or discuss this Court's decision in *Dixon*, which overruled *Grady*'s "same conduct" test for successive prosecutions and held that the only applicable test was that set forth in *Blockburger*. See *United States* v. *Williams*, 155 F.3d 418, 421 (4th Cir.) (rejecting *Rashad* as "inconsistent with a wealth of Supreme Court authority" including *Dixon*), cert. denied, 119 S. Ct. 626 (1998). The Sixth Circuit has since "narrowly" read *Rashad* as applying only "to circumstances such as were present in that case," *i.e.*, "where the concern is whether the prosecution has impermissibly divided the defendant's conduct so that it may bring repeated prosecutions under the same statute." *United States* v. *Forman*, 180 F.3d 766, 770 (1999). This case does not involve those particular concerns.[5]

Nor is there any merit to petitioner's claim that res judicata requires the government to bring all related charges against a defendant in a single proceeding. In criminal cases, the doctrine of res judicata, or claim

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[5] Petitioner also relies on the Eleventh Circuit's own decision in *United States* v. *Reed*, 980 F.2d 1568, cert. denied, 509 U.S. 932 (1993). In that case, after holding that the Double Jeopardy Clause barred the defendant's prosecution on a continuing criminal enterprise charge, the court stated in dicta that the prosecution would also have been barred by a due diligence requirement, because the government knew or should have known of the facts underlying that charge at the time of the defendant's prior prosecution. *Id.* at 1580-1581. The Eleventh Circuit, however, has since made clear that *Brown* imposes no such due diligence requirement. *United States* v. *Maza*, 983 F.2d 1004, 1008 & n.8 (1993).

preclusion, has been said to mean that, "[w]here a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication * * * is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offense." *United States* v. *Oppenheimer*, 242 U.S. 85, 88 (1916); see *Sealfon* v. *United States*, 332 U.S. 575, 578 (1948).[6] Petitioner offers no authority applying res judicata in the criminal context to preclude a defendant's subsequent prosecution not only for an offense that was charged in a previous prosecution but also for a separate offense that could have been charged but was not. Such a rule would effectively resurrect *Grady* under the rubric of res judicata. Nor would such a rule necessarily benefit petitioner in any event. Res judicata applies in the civil context only after a case has

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[6] In *Oppenheimer*, the Court held that an indictment for conspiracy to conceal assets from a bankruptcy trustee was barred by res judicata because a previous indictment for the same offense had been dismissed on statute of limitation grounds. 242 U.S. at 87-88. The Court explained that "[a] plea of the statute of limitations is a plea to the merits, * * * and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution." *Ibid.* In *Sealfon*, the Court held that the defendant's acquittal on a conspiracy charge at his first trial required reversal of his conviction for aiding and abetting at his second trial, because both prosecutions were based on proof of an agreement between the defendant and a co-defendant that "was necessarily adjudicated in the former trial to be non-existent." 332 U.S. at 580. *Sealfon* thus involved an application of issue preclusion. Although the Court in *Sealfon* stated that res judicata "operate[d] to conclude those matters in issue which the verdict determined though the offenses be different," *id.* at 578, the Court was obviously using the term "res judicata" to include issue, as well as claim, preclusion.

been fully and finally adjudicated. *Rivet* v. *Regions Bank*, 522 U.S. 470, 476 (1998). This case does not involve a second separate prosecution of petitioner, but rather a continuation of his first prosecution, which has not yet been fully and finally adjudicated. Cf. *Bailin*, 977 F.2d at 276 (recognizing that a retrial on a deadlocked count is, for double jeopardy purposes, viewed as "a 'continuation' of the first trial") (citing *Jeffers* v. *United States*, 432 U.S. 137, 152 (1977)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1999